SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

SHELDON PERLMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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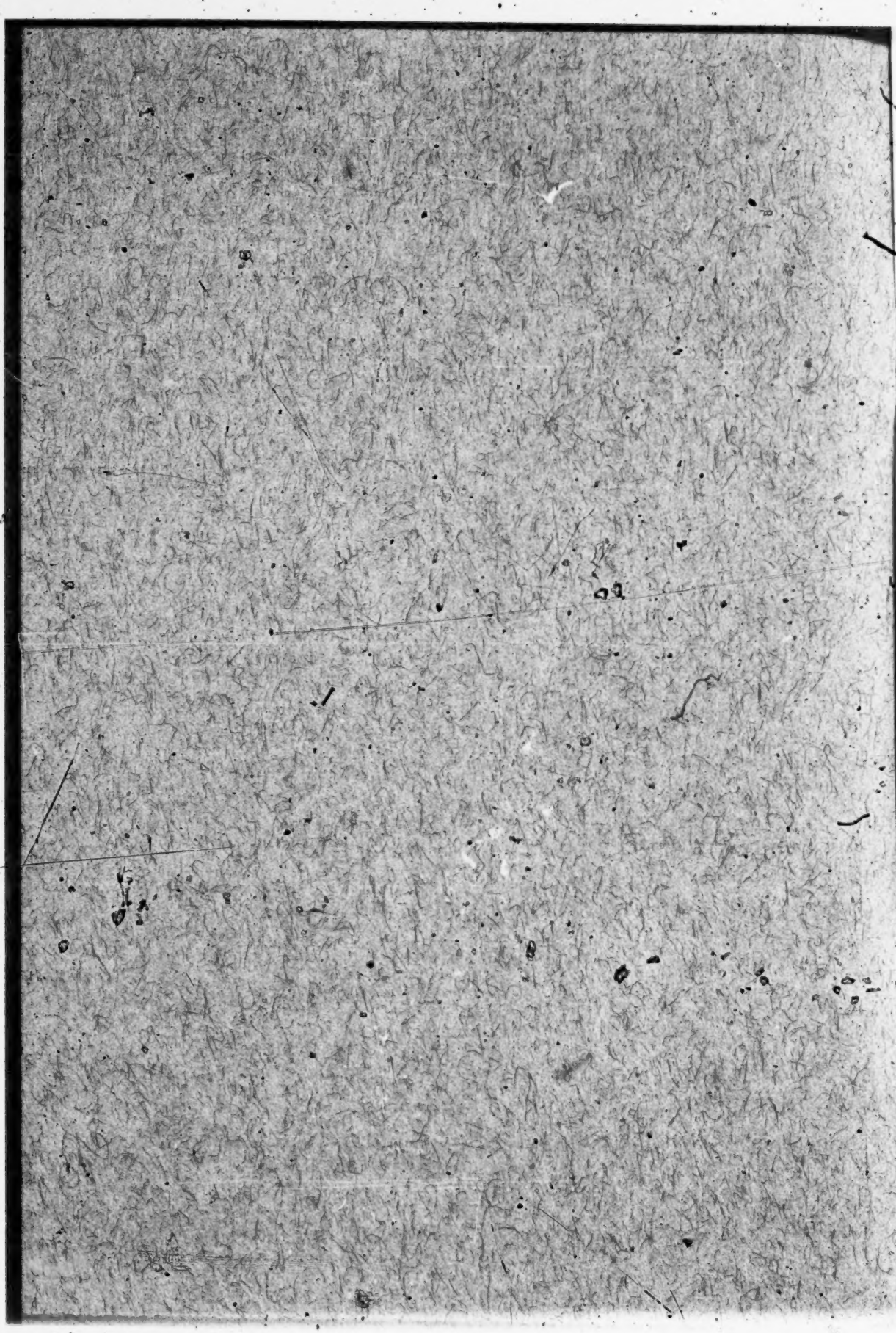

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1970. A petition for rehearing was denied on July 2, 1970 (Pet. App. 3-10). On July 31, 1970, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, who was residing abroad when he transferred hashish which was delivered within the United States, could be tried for that offense upon his return to the United States.

2. Whether there was a fatal variance between allegation and proof, and whether evidence that petitioner did not obtain a written order form was sufficient.

3. Whether evidence of earlier dealings between petitioner and the undercover agent, including a recording of a telephone conversation, was properly received.

4. Whether petitioner's defense was hampered by the unavailability at trial of a deported co-defendant who had earlier pleaded guilty.

STATEMENT

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of transferring marijuana without the prescribed written order, in violation of 26 U.S.C. 4742(a). He was sentenced to five years' imprisonment. The court of appeals affirmed.[1]

The evidence showed that between December 1965 and March 1966 petitioner lived in Tangier, Morocco. He was acquainted with one Dalton, then residing in

[1] Initially, the court of appeals had reversed but this Court reversed that determination in light of *Buie* v. *United States*, 396 U.S. 87, and remanded for further consideration. *United States* v. *Perlman*, 397 U.S. 46.

Chicago. Bottorff, an undercover agent of the Federal Bureau of Narcotics met Dalton in Chicago and Dalton offered to assist him in obtaining hashish from petitioner (Tr. 19-20).[2] In an effort to purchase hashish, Agent Bottorff wired petitioner using language suggested by Dalton (Tr. 20-21) and later mailed $20 as a "show of faith," together with a letter written by Dalton (Tr. 25). In December 1965, petitioner called Agent Bottorff in Chicago; Bottorff recorded the conversation (Tr. 34). On December 31, 1965, Bottorff received a small quantity of hashish from petitioner (Tr. 83). The agent expressed satisfaction with the quality of the hashish to Dalton a few days later (Tr. 91). Bottorff and Dalton corresponded regularly with petitioner during the next two months regarding delivery of a greater quantity of hashish. In one letter Bottorff, acting on Dalton's instructions, sent petitioner a $100 money order (Tr. 95). In March 1966, Dalton advised Bottorff that he had received a shipment secreted in a magazine (Tr. 112-113). Bottorff gave Dalton $100 and received the magazine, which contained a quantity of hashish (Tr. 114, 242). The handwriting on the wrapping paper of the magazine and in the letters to Agent Bottorff was petitioner's (Pet. App. 5). Agent Bottorff never supplied petitioner with a written order from the Secretary of the Treasury authorizing the transfer of marijuana (Tr. 121).

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[2] "Tr." refers to the transcript of proceedings before the district court, filed with this Court.

Petitioner and Dalton were indicted in May 1966 for the March transfer of marijuana to Agent Bottorff. Petitioner was arrested in July 1967 upon his return to the United States. Dalton pleaded guilty in 1966, was sentenced and subsequently paroled. He was deported in January 1968, and he was thus not available as a witness for petitioner's trial in November 1968.

ARGUMENT

1. Petitioner contends the court lacked jurisdiction to try him for this offense because he was outside the United States when it was committed (Pet. 28-29). Since, however, petitioner participated in a federal offense committed in whole or in part within the United States, he is subject to the jurisdiction of the federal courts. *United States* v. *Bowman*, 260 U.S. 94, 97; *Rivard* v. *United States*, 375 F. 2d 882, 885-887 (C.A. 5), certiorari denied *sub nom. Grolean* v. *United States*, 389 U.S. 884; *Charron* v. *United States*, 412 F. 2d 657, 659 (C.A. 9); *Brulay* v. *United States*, 383 F. 2d 345, 349-350 (C.A. 9), certiorari denied, 389 U.S. 986. See *Strassheim* v. *Daily*, 221 U.S. 280, 285.

2. There was no fatal variance, as petitioner claims (Pet. 16-20, 26) because the indictment charged a transfer from petitioner to Agent Bottorff while the proof showed the hashish was sent to Dalton who delivered it to Bottorff (Pet. 16-20, 26). That Dalton made physical delivery did not make the act of transfer exclusively his. It is well settled that when a partnership in crime exists the partners act

for each other in carrying the crime forward. *Pinkerton* v. *United States*, 328 U.S. 640, 646. The government was not required to allege separately the particular part played in the commission of the offense by each of the jointly charged defendants.

Agent Bottorff testified he never gave petitioner the required order form. Although he was not asked and did not testify whether he gave a form to Dalton, the evidence as a whole was sufficient to permit the trier of fact to infer that petitioner never obtained, directly from Bottorff, or indirectly through Dalton, an order form. This evidence showed that it was understood throughout that Bottorff, not Dalton, was to be the transferee.

3. Petitioner argues (Pet. 20-22) that evidence regarding his earlier dealings with Bottorff and Dalton in December 1965, including the recorded telephone conversation, should not have been admitted since the indictment charged only the March, 1966 transfer. Proof of the earlier transaction was properly admitted because it was necessary background for an understanding of the March transfer. The December transaction was essentially a sale of a sample as a basis for future dealing.

As for the recording, the agent was the person called by petitioner. There thus was no violation of petitioner's privacy by Bottorff's recording the conversation.[3] *Rathbun* v. *United States*, 355 U.S. 107;

[3] Despite a lack of previous familiarity with petitioner's voice, Agent Bottorff later heard petitioner speak, when the defense copied the government's tape, shortly before trial (Pet. 15). He thus was enabled to compare petitioner's voice

Lewis v. *United States*, 385 U.S. 206. The privacy considerations asserted in *United States* v. *White*, No. 13, this Term, are not present here, and there is no reason to defer action in this case pending decision in *White*.

4. Petitioner describes Dalton's deportation and consequent unavailability as a witness as "wilful spoliation and concealment of evidence" by the government (Pet. 23-27). There is, however, no evidence that the deportation was part of any scheme to suppress favorable defense evidence. Petitioner is unable to suggest how Dalton could have helped him. The statement that "if Dalton presented a written order on the official form to Perlman, then Perlman's transfer to Dalton would have been lawful" (Pet. 26) does not justify even speculation that Dalton had such a form in view of the extensive evidence of a scheme to import hashish illegally. If petitioner had received such an order form from Dalton, the defense could have produced it without Dalton present.

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in 1968 with that of his December 1965 caller and to give his opinion that the call from Morocco was from petitioner. See *Carbo* v. *United States*, 314 F. 2d 718, 743 (C.A. 9), certiorari denied *sub nom. Palermo* v. *United States*, 377 U.S. 953; *United States* v. *Benjamin*, 328 F. 2d 854, 861 (C.A. 2), certiorari denied *sub nom. Howard* v. *United States*, 377 U.S. 953; *United States* v. *McCartney*, 264 F. 2d 628 (C.A. 7), certiorari denied, 361 U.S. 845; *Wise* v. *United States*, 383 F. 2d 206 (C.A. D.C.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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